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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

DATE: FEB 01 2013

OFFICE: TEXAS SERVICE CENTER

FILE: [REDACTED]

IN RE:

Petitioner:

Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Texas Service Center (Director). It is now on appeal before the Acting Chief, Administrative Appeals Office (AAO). The appeal will be sustained, and the petition approved.

The petitioner is a patient care, education, and research organization. It seeks to permanently employ the beneficiary in the United States as a nurse practitioner and requests that he be classified as an advanced degree professional pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2).

The petition is for a Schedule A occupation. A Schedule A occupation is one codified at 20 C.F.R. § 656.5(a) for which the U.S. Department of Labor (DOL) has determined that there are not sufficient U.S. workers who are able, willing, qualified and available and that the wages and working conditions of similarly employed U.S. workers will not be adversely affected by the employment of aliens in such occupations. The current list of Schedule A occupations includes professional nurses. *Id.*

The petition was denied by the Director on the ground that the proffered position did not qualify for Schedule A designation in accordance with 20 § C.F.R. 656.5(a). Furthermore, since the ETA Form 9089 in the record was not certified by the DOL, the petition could not otherwise be approved under section 203(b)(2) of the Act because it was not accompanied by the requisite labor certification from the DOL.

The petitioner filed a timely appeal, supplemented by a brief from counsel and supporting documentation. The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

Petitions for Schedule A occupations do not require the petitioner to test the labor market and obtain a certified ETA Form 9089 from the DOL prior to filing the petition with U.S. Citizenship and Immigration Services (USCIS). Instead, the petition is filed directly with USCIS with an uncertified ETA Form 9089 in duplicate. *See* 8 C.F.R. §§ 204.5(a)(2) and (k)(4); *see also* 20 C.F.R. § 656.15.

If the Schedule A occupation is a professional nurse, the petitioner must establish that the beneficiary has a Certificate from the Commission on Graduates of Foreign Nursing Schools (CGFNS); or a permanent, full and unrestricted license to practice professional nursing in the state of intended employment; or passed the National Council Licensure Examination for Registered Nurses (NCLEX-RN). *See* 20 C.F.R. § 656.5(a)(2).

Petitions for Schedule A occupations must also contain evidence establishing that the employer provided its U.S. workers with notice of the filing of an ETA Form 9089 (Notice) as prescribed by 20 C.F.R. § 656.10(d), and a valid prevailing wage determination (PWD) obtained in accordance with 20 C.F.R. § 656.40 and 20 C.F.R. § 656.41. *See* 20 C.F.R. § 656.15(b)(2).

For the Notice requirement, the employer must provide notice of the filing of an ETA Form 9089 to any bargaining representative for the occupation, or, if there is no bargaining representative, by posted notice to its employees at the location of the intended employment. *See* 20 C.F.R. § 656.10(d)(1).

The regulation at 20 C.F.R. § 656.10(d)(3) states that the Notice shall:

- (i) State that the notice is being provided as a result of the filing of an application for permanent alien labor certification for the relevant job opportunity;
- (ii) State that any person may provide documentary evidence bearing on the application to the Certifying Officer of the Department of Labor;
- (iii) Provide the address of the appropriate Certifying Officer; and
- (iv) Be provided between 30 and 180 days before filing the application.

Notices for Schedule A occupations must also contain a description of the job offered and the rate of pay. *See* 20 C.F.R. § 656.10(d)(6).

The evidence of record establishes that the petitioner met all of the documentation requirements discussed above before the petition was filed.

Based on the entire record, the AAO determines that the Director erred in finding that the proffered position does not qualify for Schedule A designation. Accordingly, the Director's decision will be withdrawn.

To be eligible for the classification requested in the petition, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. *See Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). The petitioner must also establish its continuing ability to pay the proffered wage to the beneficiary from the priority date up to the present. *See* 8 C.F.R. § 204.5(g)(2). The priority date of the instant petition is September 25, 2009 – the date the Immigrant Petition for Alien Worker (Form I-140) was filed with USCIS.¹

Upon review of the entire record, the AAO concludes that the beneficiary had all the education, training, and experience specified on the ETA Form 9089 as of the priority date. In particular, the beneficiary was awarded a Master of Science in Nursing by the [REDACTED] on August 25, 2002; was employed for over four years (May 2004 to June 2008) as a Cardiology Nurse Practitioner by the [REDACTED] and on June 4, 2008 was recognized by the [REDACTED] as an Advanced Practice Nurse and granted "prescriptive authorization" for the "recognition type" of Nurse Practitioner-Adult Nurse Practitioner. The AAO also determines that the petitioner has established its continuing ability to pay the proffered wage from the priority date onward. Accordingly, the petition is approved under section 203(b)(2) of the Act, 8 U.S.C. § 1153(b)(2), for classification of the beneficiary as an advanced degree professional.

The burden of proof in these proceedings rests solely with the petitioner. *See* Section 291 of the Act,

¹ The regulation at 8 C.F.R. § 204.5(d) provides that "[t]he priority date of any petition filed for classification under section 203(b) of the Act which is accompanied by an application for Schedule A designation . . . shall be the date the completed, signed petition (including all initial evidence and the correct fee) is properly filed with [USCIS]." If the petition is approved, the priority date is used in conjunction with the Visa Bulletin issued by the Department of State to determine when a beneficiary can apply for adjustment of status or for an immigrant visa abroad.

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8 U.S.C. § 1361. The petitioner has met that burden.

ORDER: The appeal is sustained. The petition is approved.